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In The

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

vs.

MARY L. HELMS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The interest of each *amicus curiae* is set forth in the Appendix to this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The principle of neutrality that undergirds Establishment Clause analysis requires (i) that a general educational funding program have a secular purpose and (ii) that the benefits be available to all schools without regard to religion. Indeed, religious practices and religious expression are prohibited by the Free Exercise and Free Speech Clauses, respectively, as bases for disqualifying schools that seek to participate in the educational program.

ARGUMENT

I. The Theory Of No-Aid Separationism Is No Longer Plausible; Indeed, In Its Modern Setting The Theory Is Hostile To Individual Religious Choice.

Chapter 2 of Title I of the 1965 Elementary and Secondary Education Act, as amended, 20 U.S.C. §§ 7301-7373 (Supp. 1998), permits the lending of educational materials and equipment to primary and secondary schools without regard to the religious or secular character of the schools. Respondents, who urge upon this Court a rule of no-aid separationism,[2] maintain that such

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[1] No counsel for either party authored this brief in whole or in part. No person or organization, other than *amicus* Christian Legal Society, has made a monetary contribution to the preparation or submission of this brief.

[2] As used in this brief, the term "no-aid separationism" refers to a theory opposing all forms of aid to religious organizations. Over the years – and notwithstanding their

religiously neutral assistance is violative of the Establishment Clause. The dispute over Chapter 2 assistance is part of a much larger clash between no-aid separationism and the principle of neutrality, namely: whether the benefits of a general governmental program, secular in purpose, to benefit K-12 schools, institutions of higher education, or social welfare providers must be denied to "pervasively sectarian" organizations.[3]

Since *Widmar v. Vincent*,[4] the general trajectory of this Court's Establishment Clause decisions has been away from no-aid separationism and toward neutrality.[5] The

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vigorous advocacy to the contrary – those holding to this no-aid theory have had to accept aid to religious organizations that are not "pervasively sectarian" (see, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971)), as well as forms of indirect aid to religious education (see, e.g., *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*, 463 U.S. 388 (1983)).

[3] There is no conflict between no-aid separationism and the neutrality principle over whether the Establishment Clause prohibits a special tax or user fee earmarked for a religious purpose. It does. Justice Thomas in *Rosenberger* noted that history indicates the Founders intended the Establishment Clause to prevent earmarked taxes for the support of religion. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 853-55 (1995) (Thomas, J., concurring); see also *Kiryas Joel Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (holding, *inter alia*, that government may not enact a law that extends a benefit to a single religious sect as opposed to all groups, religious and secular). What is disputed is whether monies collected by general taxation and appropriated to support a comprehensive educational program, one that does not discriminate against the participation of faith-based educational providers, is violative of the Establishment Clause.

[4] 454 U.S. 263 (1981) (striking down a state university's discriminatory restrictions on student religious groups meeting in classrooms and other campus buildings as violative of the Free Speech Clause and not required by the Establishment Clause).

[5] Discussed elsewhere is the Court's movement away from no-aid separationism and, however cautiously, in the direction of

Court's most recent holdings addressing the matter are *Agostini v. Felton*[6] and *Rosenberger v. Rector and Visitors of the University of Virginia*.[7] Although the *Agostini* and *Rosenberger* majorities did not embrace the neutrality principle without qualification, the law today is far closer to neutrality than to the no-aid separationism of the 1970s and mid-1980s.[8] The *Agostini* Court, for example, was no longer willing to assume that direct assistance would be

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neutrality. See Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 703-07 (1997); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 Emory L.J. 1, 20-39 (1997); John H. Garvey, *What's Next After Separationism?*, 46 Emory L.J. 75 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1089-94 (1996); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. Contemp. Legal Issues 357, 364-66, 369, 371-73 (1996); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 710-17 (1996).

[6] 521 U.S. 203 (1997) (upholding federal education program where government employees deliver remedial services to students at the campus of the students' primary or secondary school, including religious schools deemed "pervasively sectarian").

[7] 515 U.S. 819 (1995) (holding university's denial of funding for printing of student newspaper because of paper's religious viewpoint was discrimination violative of Free Speech Clause and not required by the Establishment Clause).

[8] Two of these older no-aid cases are under reconsideration here: *Wolman v. Walter*, 433 U.S. 229 (1977) (plurality opinion in part) (disallowing loan of instructional materials and transportation for field trips at religious schools), and *Meek v. Pittenger*, 421 U.S. 349 (1975) (plurality opinion in part) (disallowing loan of instructional materials and the provision of therapeutic services at religious schools).

diverted to the indoctrination of religion by authorities at Roman Catholic K-12 schools.[9] *Agostini* upheld direct assistance to "pervasively sectarian" schools provided that the funding program was religiously neutral. Additionally, because the aid was conveyed directly to the religious school, the *Agostini* Court required sufficient regulatory controls so that government officials could be assured that the assistance was not diverted to religious indoctrination.[10] In *Agostini*, the Court found sufficient safeguards in the form of the aid (government employees providing remedial educational services) and in the administrative oversight that attended delivery of the aid. The law has never been that direct funding of "pervasively sectarian" providers is *per se* violative of the Establishment Clause. That would be a rule of form over substance, and this Court long ago rejected such formalism.[11]

The neutrality principle is not an alternative to separation.[12] *Amici* hold to church/state separation and its codification in the Establishment Clause. Neutrality, rather, is an application of what the separation of church and state was meant to be.[13] A correction to the distortion

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[9] 521 U.S. at 226, 234-35.

[10] 521 U.S. at 223-35.

[11] *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980), upheld direct cash payments to religious K-12 schools to defray the cost of state-mandated testing, explaining:

> We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash.

Id. at 658.

[12] Laycock, *Underlying Unity, supra* note 4, at 46-47.

[13] The neutrality principle must not be confused with nonpreferentialism. The theory of nonpreferentialism argues for the constitutionality of a governmental education program that

wrought by the no-aid theory, the neutrality principle is rooted in the minimization of the government's influence over individual religious choice.[14]

Two hundred years ago, when the Republic was small and most activity that comprised civil society took place in the nongovernmental sector, no-aid separationism was a plausible ordering of American society. In the decades immediately following the Nation's founding, religious organizations were deeply involved in education (as well as health care and charitable activities) and at the same time largely avoided contact with government (federal, state and local). For government to have eschewed involvement with religious organizations was not a matter of indifference, discrimination, or hostility. Rather, because America's post-colonial governments likewise had little to do with secular education, it was a matter of equal treatment to have little to do with religious schooling. Government largely left the matter of education to the independent sector.[15] Government was small (perceived as the "night watchman" state) and most

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allows for the funding of all religious schools on an equal basis. The theory of nonpreferentialism is not concerned with equal treatment as among secular and religious schools. The neutrality principle, on the other hand, requires equal treatment as among all schools, whether secular or religious and whether government-operated or independent. Concerning problems with nonpreferentialism, see Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1988).

[14] Laycock, *Underlying Unity, supra* note 4, at 45-46; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990); see Esbeck, *supra* note 4, at 26.

[15] See generally Rockne McCarthy, Donald Oppewal, et al., Society, State, & Schools 79-86 (1981); Warren A. Nord, Religion & American Education: Rethinking a National Dilemma 63-66 (1995).

organized education was both religiously oriented and privately funded.

This Eighteenth Century arrangement can continue to be applied to conditions at the end of the Twentieth Century only by clinging to the myth that the modern nation-state exercises limited control over the resources available for devotion to the educational needs of Americans.[16] Holding to this myth, no-aid separationists insist it is fair to ask religious citizens both to support their faith-based schools via sacrificial tuition payments and to pay taxes for the support of secular schools (both government-operated and independent nonsectarian) now receiving substantial government aid.

Reality, of course, is that the modern "affirmative" state, with its high taxes and pervasive regulation, has a near monopoly over the resources available for educational spending. With the advent of the welfare/regulatory state in the middle third of this century, to continue enforcing a no-aid rule has the effect of confining religious education to ever smaller enclaves of private life. If schools operated by faith-based organizations are to participate along with secular schools in meaningfully serving civil society, they are put to a cruel choice. No-aid separationism demands that religious schools either secularize and thereby qualify for aid, or the schools close their doors to all but the well off for lack of funding. Thus, in its present-day impact, the theory of no-aid separationism is hostile toward faith-based schools. The

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[16] See Donald A. Giannella, *Religious Liberty, Nonestablishment, And Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522-26 (1968). Professor Giannella alludes to a most apt illustration. Consider a church in a Marxist state. There is no privately-held real estate, all land being owned by the state. Needing to expand, a church requests a plot of land on which to build a new house of worship. The state refuses citing the separationist prohibition on state aid to religion. Given the state's monopoly on real estate, the state's denial of aid is hardly neutral toward religion. *Id.* at 522-23.

changed circumstances work such unfairness that denial of equal treatment is no longer a plausible ordering of church/state relations. The absence of evenhandedness not only suffocates pedagogical and religious pluralism by creating a monolithic, secular-dominated structure for the delivery of educational services, but also viciously eliminates a fuller range of school choices (including faith-centered choices) for Americans of poor and modest means.

II. No-Aid Separationism Requires Intentional Discrimination Against Religious Schools, A Violation Of Both The Free Speech And Free Exercise Clauses; Arguments That The Establishment Clause Overrides The Free Speech And Free Exercise Clauses Make No Sense.

The exclusion of "pervasively sectarian" K-12 schools from Chapter 2 eligibility simply because of how they express and practice what they believe, is discriminatory on the bases of religious speech and religious exercise. Such intentional discrimination is *prima facie* violative of the Free Speech[17] and Free Exercise[18] Clauses. No-aid

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[17] *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (holding that intentional, content-based discrimination regarding speech is subject to strict scrutiny and will be struck down regardless of the absence of censorial motive).

[18] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding city ordinance regulating ritual sacrifice of animals was intentionally discriminatory); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (stating that *Sherbert v. Verner*, 374 U.S. 398 (1963), is still the law insofar as *Sherbert* held that whenever government makes individualized determinations, officials must not purposefully discriminate against claims of religious exemption); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a law disqualifying clergy from holding public office).

separationists concede the overt discrimination that follows from their theory. They insist, however, such discrimination is required by the Establishment Clause. Accordingly, no-aid separationists posit a conflict-between-the-clauses internal to the First Amendment, with the Establishment Clause overriding free speech and free exercise rights. The neutrality principle, however, sensibly posits that these three clauses be read in harmony.

During the 1980s and 1990s, in an unbroken line of victories for freedom of speech, the Supreme Court held that religious expression by individuals and religious organizations was entitled to the same high protection accorded nonreligious expression (e.g., speech of political, artistic, or educational content).[19] No-aid separationists, who lost the judgment in these cases, framed their contention as a clash of two First Amendment clauses: a right under the Free Speech Clause to freedom of religious expression without discrimination versus an Establishment Clause right to a government that does not aid religion (the aid taking the form of the use of government property to convey a religious message). With the issue so framed, no-aid separationists invited this Court to "balance" the conflicting clauses, hoping to tip the scale in the direction of their bias for a naked public square, that

[19] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (finding content-based discrimination against religious speech in public forum not justified by Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding content discrimination); see *Bd. of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990) (upholding Equal Access Act, 20 U.S.C. §§ 4071-74 (1996), legislation that prohibits discrimination against religious speech at secondary schools).

is, a marketplace of ideas denuded of all religion. They lost. However, as no-aid separationists had urged, this Court did frame the issue in such a way that Establishment Clause compliance could, in theory at least, supply a "compelling interest" for overriding the Free Speech Clause.

Capitol Square Review & Advisory Board v. Pinette[20] is a recent illustration of the Supreme Court's framing of the issue in a manner that creates this "tension" between the Free Speech and Establishment Clauses. In *Pinette*, the State of Ohio created a public forum in a park by allowing citizens to erect temporary displays symbolizing each group's message. But when the Ku Klux Klan sought permission to erect a Latin cross during Christmas, state officials balked. The Klan then sued for impairment of its free speech rights and ultimately won.

The *Pinette* Court held that on these facts the Establishment Clause was not violated by the presence of the Latin cross in the park. Accordingly, the state was ordered to permit the religious display on the same basis as all other citizen displays allowed in the park. However, in the course of holding that private religious speech was protected by the Free Speech Clause from content and viewpoint discrimination, the Court indicated that on different facts the Establishment Clause could require suppressing the private speech.[21] With all due respect, this makes no sense. There is nothing in the text of the First Amendment that suggests that whenever these clauses "collide" the Establishment Clause is of higher constitutional value and thus supersedes the Free

[20] 515 U.S. 753 (1995).

[21] *Id.* at 761-62; see also *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

Speech Clause.[22] One could just as arbitrarily assume that, in the event of conflict, the Free Speech Clause preempts the Establishment Clause. What the Court ought to conclude from this apparent conflict-in-the-clauses is that there has been an error in the construction of one or both clauses.[23]

The Free Exercise Clause cuts a somewhat different channel[24] than the Free Speech Clause at issue in *Widmar*

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[22] See *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values . . . to invoke the judicial power of the United States.").

[23] The clauses-in-conflict problem goes away when the Establishment Clause is understood not as a personal individual right, but as a structural restraint on government power. If the speaker is private rather than governmental, then the Free Speech Clause supplies a right of equal access to the forum and the expression cannot be suppressed simply because its content is religious. There is never any "tension" with the Establishment Clause, real or apparent, for that clause is a restraint on government rather than private actors. Hence, the sole task in cases like *Pinette* is to determine whether the speaker is private or governmental. If private, then the Establishment Clause is irrelevant because the clause does not restrain private actors. If the speaker is governmental, then the individual-rights orientation of the Free Speech Clause is irrelevant because the government has no free-speech rights. One First Amendment clause never need be "balanced" against the other. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 84-86 (1998).

[24] The Free Exercise Clause has an independent reach of its own, namely, the protection of actions that are consistent with one's declarations of faith. This point was succinctly stated by Justice White in *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion):

> It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well a religious belief and speech.

Id. at 372 (White, J., dissenting).

and *Pinette*. The Free Exercise Clause prohibits intentional discrimination against religion, as well as against particular religious beliefs and practices.[25] Yet the "pervasively sectarian" test necessarily causes state educational bureaucracies, who administer Chapter 2, to discriminate against the religious beliefs and practices of schools dubbed "pervasively sectarian." Such discrimination puts tremendous pressure on faith-based educational providers to compromise their spirituality to prevent losing opportunities for grants.[26] The current system makes comprehensive government funding programs relentless engines of secularization. This reduces the variety of school offerings in America, destroying innovation and educational pluralism.[27] The secularization will, over

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[25] See cases cited *supra* note 17. The Free Exercise Clause prohibits more than just intentional discrimination on the basis of religion or religious denomination. The clause also prohibits intentional discrimination on the basis of a particular religious practice (see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), striking down a municipal ordinance that discriminated against the practice of the religious slaughter of animals), such as the faith-based practices at religious schools singled-out for unfavorable treatment by the "pervasively sectarian" test.

[26] See Charles L. Glenn, The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies (Princeton Univ. Press, forthcoming 1999); Stephen V. Monsma, When Sacred & Secular Mix: Religious Nonprofit Organizations & Public Money 109-46 (1996).

[27] Long ago this Court recognized that instrumental to American liberty was the ready availability of a richly plural educational system, one responsive to parents and guardians. See *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating

time, render some providers willing to water down their programs, causing them to become little different from the sometimes ineffectual state-operated schools. Such a rule of law can only add to America's much heralded crisis in K-12 education.

Conceding, as they must, that intentional discrimination is *prima facie* violative of the Free Exercise Clause, no-aid separationists respond by putting the Free Exercise Clause at war with the Establishment Clause when they seek to deny "pervasively sectarian" providers the same eligibility as all other educational providers. They do so, once again, by arguing clauses-in-conflict and that no-establishment should override free exercise.[28] The argument would have our Nation's founding generation drafting a constitutional amendment that is internally contradictory. This imagined conflict is brought about by conceptualizing the Establishment Clause as securing a

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overbearing regulations imposed on independent, nonsectarian schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating state law requiring attendance at government schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating statute forbidding the teaching of foreign languages in elementary schools, both government-operated and independent).

[28] For examples in the circuit courts of appeal of having to deal with this clauses-in-conflict argument, see *Peter v. Wedl*, 155 F.3d 992, 996-97 (8th Cir. 1998) (affirming lower court's ruling that both Free Exercise and Free Speech Clauses are violated by Minnesota regulation that provided aid to special education students unless the student was enrolled in a religious school; the regulation was purposefully discriminatory on the basis of religion and not required by the Establishment Clause); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (striking down, as violative of the Free Exercise Clause, a U.S. Army regulation that extended benefits to secular day-care centers but discriminated against faith-based centers chosen by the parents; the government's discrimination was found not required by the Establishment Clause).

right to freedom *from* religion, and the Free Exercise Clause doubtlessly secures some right to exercise religion. With the issue so framed, then of course the two rights will be on a collision course.[29] The resulting "conflict," no-aid separationists propose, is to be relieved by tipping the "balance" in the direction of their view of the Establishment Clause. Having the two clauses pull in opposite directions leaves broad discretion to the courts to "balance" one against the other and thereby having to choose between them. Again, this makes no sense. It is neither consistent with the First Amendment's text (neither clause states it has primacy over the other), nor are such conflicts intrinsic to the Religion Clauses and thereby logically unavoidable.[30]

There is no "tension" between the First Amendment Religion Clauses. Neither the Establishment Clause nor the Free Exercise Clause (indeed, none of the clauses of the Bill of Rights) vested new powers in Congress.[31]

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[29] Professor Meiklejohn notes the analytical difficulty when a single constitutional clause is invoked to do service as both protecting personal religious liberty and affording a freedom from religion.

> [A]ll discussions of the First Amendment are tormented by the fact that the term "freedom of religion" must be used to cover "freedom of nonreligion" as well. Such a paradoxical usage cannot fail to cause serious difficulties, both theoretical and practical.

Alexander Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 71 (1949).

[30] See Esbeck, *supra* note 22, at 11-12, 97-104 (differentiating the Free Exercise Clause from the Establishment Clause).

[31] In a speech before the House of Representatives introducing his draft of the proposed amendments, James Madison described their purpose as follows: "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the

Rather, each provision of the Bill of Rights was to act as a "negative" on powers that might otherwise have been implied from the 1787 Constitution. The Bill of Rights was passed by the First Congress (and sent to the states for ratification) in order to assuage the fears of the Anti-federalists. They sought to negate power that might otherwise be implied from the more open-ended delegations in the original Constitution and used by Congress to

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Government ought not to act, or to act only in a particular mode." 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789). In *Legal Tender Cases*, 79 U.S. 457 (1870), the Supreme Court observed:

> The preamble to the [congressional] resolution submitting [the Bill of Rights to the states] for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of [federal] powers, that further declaratory and restrictive clauses should be added." . . . Most of [the proposed] amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

Id. at 535. The preamble in it entirety is reproduced at 5 THE FOUNDERS' CONSTITUTION 40-41 (Philip B. Kurland & Ralph Lerner eds., 1987). See also *United States v. Balsys*, 524 U.S. 666, 118 S. Ct. 2218, 2223-24 (1998) (stating that the received understanding of the Bill of Rights is that it was instituted to restrict the powers of the national government); Edward Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 105 (1957) (same); Leonard W. Levy, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 84 (1986) (same); Leonard W. Levy, *The Establishment Clause*, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 69, 83, 89-90 (Robert A. Goldwin & Art Kaufman eds., 1987) (same).

interfere with personal liberties.[32] It is logically impossible for two clauses to conflict if both are "carve-outs" of power.[33]

The Establishment Clause, understood as embodying the neutrality principle, eliminates these ersatz "conflicts" among the clauses of the First Amendment. By not intentionally discriminating against faith-specific expression, the Free Speech Clause is no longer in "tension" with the no-establishment principle. Similarly, when educational program funding is available without regard to specific religious practices of "pervasively sectarian" schools, the Free Exercise Clause is no longer in "tension" with the Establishment Clause. Achieving juridical harmony among these three clauses is, without more, a strong commendation for the neutrality principle.

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[32] See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (observing that a principal source of opposition to adoption of the original Constitution was the fear that national powers might be exercised in a manner impairing liberty, thus leading to a proposed Bill of Rights limiting the powers of the national government).

[33] Although the Religion Clauses cannot conflict, they can overlap. Thus, a single incident can properly give rise to meritorious claims under both the Free Exercise Clause and the Establishment Clause. To illustrate, assume a public school adopted a regulation requiring that the Lord's Prayer be recited by students at the beginning of each classroom day. A third-grade Islamic student, along with all others, is compelled to recite the prayer. As a Muslim, the student has suffered a personal religious harm for which the Free Exercise Clause gives individuated relief. The student could also claim under the Establishment Clause, leading to injunctive relief against continued school-wide enforcement of the prayer regulation.

III. Distinguishing Between Pervasively And Non-Pervasively Sectarian Providers Is Inconsistent With This Court's Case Law Elsewhere.

No-aid separationists acknowledge that this Court's cases permit direct funding of faith-based educational providers, but only so long as the schools are not dubbed "pervasively sectarian."[34] The New Orleans, Louisiana, schools receiving Chapter 2 aid are so labeled. The daunting task of screening out "pervasively sectarian" schools from those that are only "faith-affiliated" means that state officials will have to apply a religious test to all faith-affiliated schools, culling those eventually determined to be "too religious." Merely to draw the "too religious" versus "secular enough" distinction, however, requires state educational bureaucracies – and ultimately the courts – to probe into the nature and practices of all faith-affiliated schools and to attribute religious meaning to their religious beliefs, words, and actions. Such inquiries by civil magistrates into the religious significance of tenets and religious observances violates the most fundamental aim of church/state separation which is to keep these two centers of authority, God and Caesar,

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[34] The "pervasively sectarian" test first surfaced in *Lemon v. Kurtzman*, 403 U.S. 602, 614-22 (1971). The last two cases where the Court struck down governmental aid using the test are *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985). However, *Ball* was recently discredited and partly overruled in *Agostini*, and *Aguilar* was overruled in its entirety. 521 U.S. at 226-35. Therefore, the last occasion the Court used the "pervasively sectarian" test to invalidate a law was *New York v. Cathedral Academy*, 434 U.S. 125 (1977). That means that the period of dominance of the "pervasively sectarian" test is a mere six years (1971 to 1977), and that period is now over twenty-two years past.

so to speak, within their respective spheres of competence.[35]

To be "pervasively sectarian," explained an earlier Supreme Court, means that a faith-affiliated provider's "secular activities cannot be separated from [its] sectarian ones."[36] This, of course, just rephrases the question. Now the test requires officials to ask what is secular and what is "sectarian" about each specific school, and when are the two so blended that the secular alone cannot be separately funded. Further complicating the matter, this inquiry is to operate in the context of a wide variety of government-supported educational services (preschools, primary schools, secondary schools, vocational schools, and colleges) and in the face of a broad and complex diversity of pedagogy employed by these educational providers.

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[35] William Clancy aptly frames the constitutional settlement embodied in the Establishment Clause this way:

> [T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 27-28 (1958).

[36] *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion).

This Court, in other contexts, has refused to permit state bureaucracies to probe into the religious meaning of an organization's religious words, practices, and events.[37] A parallel concern over limiting the actions of government to matters within its power is behind the Supreme Court's determination that it lacks subject matter jurisdiction over disputes internal to an ecclesiastical organization.[38] This

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[37] See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit).

[38] Concerning disputes over doctrine, ecclesiastical polity, the selection or promotion of clerics, and dismissal from church membership, the Supreme Court has said that civil courts are essentially without subject matter jurisdiction. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (*per curiam*) (avoid doctrinal disputes); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*per curiam*) (First Amendment prevents judiciary, as well as legislature, from

jurisdictional bar to deciding intrachurch issues is not limited to conflicts implicating ownership of church real estate. The bar on judicial power extends as well to all civil and criminal litigation whenever a dispute turns on matters that are inherently religious, including torts,[39] contracts,[40] civil

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interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry).

[39] See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 1999 WL 427338 (D.N.J. 1999) (subject-matter jurisdiction dismissal of libel and slander claim filed against church adjudicatory); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993) (dismissing defamation action against church where the offensive statements arose out of church controversy); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 810-12 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject-matter jurisdiction over defamation claim against church hierarchy); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *Tidman v. Salvation Army*, 1998 WL 391765 (Tenn. Ct. App. 1998) (dismissing privacy and outrageous conduct tort claims brought by former employee of faith-based organization discharged for having extramarital affair); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tx. Ct. App. 1998) (subject-matter dismissal of negligence claims by parishioner brought against church and youth pastor); *Korean Presbyterian Church v. Lee*, 880 P.2d 565 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-41 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

[40] See, e.g., *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681 (Ill. App. Ct. 1994) (holding that breach of contract complaint was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a

rights employment legislation[41] and criminal fraud.[42]

Judge-made classifications along the lines of "pervasively" and non-pervasively sectarian are no less hazardous to administer, for the inevitable result is that theologically liberal providers of educational services will be deemed "secular enough" and thus acceptable recipients of Chapter 2 assistance, whereas theologically conservative providers of educational services will be found

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parochial school teacher was an ecclesiastical issue into which civil court may not inquire); *McEnroy v. St. Meinrad School of Theology*, 1999 WL 418701 (Ind. App. 1999) (dismissing claim for breach of employment contract brought by professor of theology against seminary); *Basich v. Board of Pensions*, 540 N.W.2d 82 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of pension contract and breach of fiduciary duty); *Pearson v. Church of God*, 458 S.E.2d 68, 71 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract).

[41] See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun's gender discrimination Title VII claim was barred by Establishment Clause); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 707-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based upon excessive governmental entanglement with religion in violation of Establishment Clause); *Van Osdol v. Vogt*, 908 P.2d 1122, 1130-32 (Colo. 1996) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; Title VII claim against church was properly dismissed); *Geraci v. Eckankar*, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995) (gender discrimination claim against church is barred by Establishment Clause).

[42] *United States v. Ballard*, 322 U.S. 78 (1944) (in trial for mail fraud, the truth or falsity of a religious belief or profession may not be subject to scrutiny by a jury).

"too religious" and thus denied Chapter 2 assistance.[43] A more discriminatory rule that defines itself to coincide with a theological division could hardly be devised.

The foregoing two paragraphs rely upon Establishment Clause cases. Ancillary to deciding free exercise cases, this Court has likewise considered itself limited in power. For example, it has held that a religious belief or practice need not be central to (and therefore more important to) a claimant's faith as a prerequisite to receiving the protection of the clause.[44] This is because civil

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[43] Meaningful denominational divisions among religions are no longer along the old alignments of Protestant versus Catholic versus Jewish. The realignment is now orthodox (Protestant, Catholic and Jewish) versus progressive (Protestant, Catholic and Jewish). James Davison Hunter, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42-46 (1991). Professor Hunter, a sociologist of religion, has identified the pervasively sectarian groups as "orthodox," and the theologically liberal groups as religious "progressives." Hunter explains that the religious orthodox are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." Religious organizations most willing to conform to contemporary culture will appear to the government as less sectarian. Conversely, those organizations more conservative in theology and that have resisted acculturation will inevitably appear to civil courts as more sectarian. To exclude from government aid programs those groups that are more sectarian is to punish those religions that resist conformity to culture while favoring those religions willing to evolve and conform to secular culture. Hence, the "pervasively sectarian" test is discriminatory against the religiously orthodox.

[44] *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982)

magistrates are not competent to decide which practices are at the "core" of a given religion and which are peripheral to its faithful practice. Moreover, the Court has said that a religious claimant may disagree with co-religionists or be unsure or wavering and still receive full free exercise protection.[45] This is because a civil magistrate has no juridically intelligible means for resolving doctrinal disputes or gauging the relative degree of a claimant's religious fervency. The "too religious" versus "secular enough" test casts the civil magistrate into just as uncharted a water as the questions avoided in the foregoing Establishment Clause cases.

The problem illustrated by these cases is not that government officials are, without more, interacting with religious organizations. Some regulatory interaction between government and religious associations is inevitable, more so as government has gotten bigger and society more complex. Thus, the argument is not that regulatory fact finding into religious organizations is in some sense an invasion of ecclesiastical "privacy" or that the net increase in administrative probing will "entangle" government with faith-based schools beyond some threshold that is thought to be "excessive."[46] Rather, the problem is that the government is being asked to adjudicate matters

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(rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

This rule was recently reaffirmed in *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997), as helping to explain the decision in *Smith*. The compelling-interest balancing test, abandoned in *Smith*, required a judge to weigh the importance of a religious practice against a state's interest in applying a neutral law without any exceptions for religious burdens.

[45] *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of religious interpretation.").

[46] The Supreme Court's excessive entanglement analysis is addressed in Point IV of this brief.

beyond its constitutional competence, that is, asked to pass on subject matters reserved to the cognizance of religion.[47] That explains why the Supreme Court states the foregoing rules, not as an individual right to free exercise of religion, but in terms of the civil courts lacking subject matter jurisdiction: "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[48]

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[47] Professor Stackhouse notes just how remarkable was the American church/state settlement in that a government should go beyond the protection of the personal free exercise rights of individuals and to limit its sovereignty by acknowledging another center of competence when it comes to matters of spiritual cognizance:

> [The First] amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself. . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Max L. Stackhouse, *Religion, Rights, and the Constitution*, in AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

[48] *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). See also *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *Lyng v.*

The problem of exceeding constitutional power arises when government is called on to weigh doctrinal questions or to otherwise intrude into that sphere of inherently religious matters reserved to religion and religious organizations. The "pervasively sectarian" test requires administrative – and eventually judicial – discovery into the self-understanding, creed, ecclesiology, mission, pedagogic motivation, and other beliefs and activities of the "too religious" schools and their differentiation from the "secular enough" schools. Government simply is not competent to scour the organic documents, mission statements, textbooks, and classrooms of faith-related schools and place its own interpretation on what this pedagogy means in terms of being "too religious." Such bureaucratic rummagings will unmask all manner of ecclesiastical "facts" in which state educational personnel will be the first to admit they have no training, no experience, and no theological insight. The possibilities for misunderstandings, spiritual insensitivity, and outright sectarian bigotry wrought by the "too religious" test is breathtaking. Bureaucratic divining into the "pervasively sectarian" question will trample any notion that God and Caesar, so to speak, must stay – for the benefit of both – within their respective spheres.

Unlike no-aid separationism, neutrality in program assistance avoids the lack-of-competence problem by placing the focus not on the character of the school, but on what Chapter 2 provides. The Chapter 2 program, out of secular purpose, purchases educational equipment and loans it to schools without regard to religion. Periodic on-

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Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting nonpreferentialism because its application "invite[s] the courts to engage in comparative theology"); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (courts are "ill equipped to sit as a national theology board").

site visits are performed to monitor all independent schools and ensure that the educational purpose is realized. In this manner, the government keeps its eye on whether students are actually being helped and thus whether the secular purpose of the program is being fulfilled. Additionally, neutrality empowers the ultimate beneficiaries (students and their parents) by enabling them to select from a plurality of educational providers, including, if they so desire, a faith-based school.

IV. Entanglement Analysis Masks What Is Properly An Inquiry Concerning Governmental Intrusion Into Inherently Religious Matters.

The second prong of the Supreme Court's *Lemon* test requires that the primary effect of a law not be the advancement of religion. The test acquired a third prong in 1971 called "excessive entanglement,"[49] only to have entanglement analysis recently absorbed back into the effect prong.[50] Although entanglement is once again just a factor to consider as part of the overall "effect" inquiry, this Court has never said that such analysis is to be abandoned altogether. The court of appeals addressed Chapter 2 in relation to regulatory entanglement (Tr. 52a-53a), and it is anticipated that Respondents' Answer Brief will do so as well.

Entanglement analysis appears wildly uneven, strictly scrutinized by the Court in some opinions[51] while in others receiving only summary review.[52] Clearly these cases are not turning on the aggregate number of administrative contacts with religion, or even on the intensity of

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[49] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[50] *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997).

[51] See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 614-22 (1973).

[52] See, e.g., *Agostini v. Felton*, 521 U.S. 203, 232-34 (1997); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985).

such contacts. Rather, this Court appears to instinctively vary its entanglement analysis based on whether the regulatory intrusion is (or is not) into matters that are inherently religious.

In a modern, complex nation with extensive regulation and massive subsidization of the independent sector, some interaction between government and religion is inevitable, often useful, and sometimes in the interest of both.[53] Even in the absence of government funding, the state can and does impose reasonable regulation on the educational, health care, and charitable activities of religious organizations.[54] If regulatory entanglement *vel non* was the real concern of the Supreme Court, there would be entanglement analysis regardless of funding any time a religious organization claimed it was the victim of excessive regulation. Instead, entanglement analysis is rarely performed when government regulates but does not fund religious organizations. The Establishment Clause does indeed place limits on the government's regulatory power, but only when the regulation interferes

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[53] When government appropriates tax monies it has a duty, of course, to reasonably account for how the funds are utilized. Regulatory controls that "trace" funds appropriated under neutral educational programs via grants or in-kind services are entirely proper in order that the monies actually benefit students and needy parents as intended. The required accounting should be evenhanded for all providers, whether religious or secular, so that no class of providers is singled out for greater scrutiny.

[54] See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* is regarded as a charter of religious liberty, not only of the freedom for faith communities to operate religious schools but also for the freedom of parents to direct the religious upbringing of their children. *Id.* at 535-36. Nonetheless, before acknowledging these freedoms, the Court in *Pierce* took care to first stake out the government's power to reasonably regulate religious schools and their teachers, as well as acknowledge some governmental interest in minimal curricular standards. *Id.* at 534.

with inherently religious matters.[55] Thus, the straight forward question to be asking is whether the regulatory oversight brought about by the legislation in question causes government to intrude into that sphere of activities that the Establishment Clause consigns to religion and religious organizations.

The cases bear out that this Court's sensitivity to entanglement is proportional to a law's proximity to subject matters that are inherently religious. For example, this Court has deemed the entanglement excessive when the regulation in question intrudes on inherently religious matters.[56] In parallel with the line of cases set out in the foregoing note, when upholding legislation that exempts religion from a regulatory burden that would otherwise interfere with inherently religious matters, the Court has expressly welcomed the exemption as a means of preventing entanglement from occurring.[57]

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[55] See Esbeck, *supra* note 22, at 77-81.

[56] See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (holding that courts without competence to adjudicate essentially doctrinal disputes for, *inter alia*, avoidance of entanglement); *Rusk v. Espinosa*, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations); cf. *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (holding entanglement not excessive when only governmental task is review of secular instructional materials); *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 660-61 (1980) (upholding reimbursement to religious schools of the cost of state-mandated tests because the tests were wholly secular and not part of regular teaching program, hence entanglement not excessive).

[57] See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335-36 (1987) (religious exemption from regulatory burden is permissible legislative means to alleviate significant governmental interference with ability of religious organizations to define and carry out their religious mission); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (property tax exemption for

Conversely, when the subject matter being regulated does not touch upon inherently religious matters, this Court has played down the importance of entanglement analysis. For example, the Court has given cursory entanglement analysis when the legislation in question addresses commercial, public health, or similar matters otherwise unrelated to subjects that are inherently religious.[58] In parallel with the line of cases set out in the foregoing note, when upholding ordinary commercial or labor law legislation that has no exemption for religious organizations or practices, the Court has remarked that the absence of an exemption is a good thing because it avoids the regulatory entanglement that administering such an exemption would entail.[59]

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religious organizations has the laudable effect of avoiding entanglement when tax authorities evaluate the worth to the community of faith-based social welfare programs); see also *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (construing unclear religious exemption in tax legislation in a manner that broadened the scope of the exemption and thereby avoiding First Amendment issue administrative entanglement); *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (desiring to avoid significant risk of entanglement, Court employed unusual rule of construction that thereby exempted religious schools from federal regulation).

[58] See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 615-18 (1988) (holding that because faith-based social services are not inherently religious, some regulation attendant to administration of program does not amount to excessive entanglement); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (regulation of commercial operations of religious organization undertaken for a commercial purpose do not amount to excessive entanglement); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 762-65 (1976) (plurality opinion) (because religious colleges are not pervasively religious, regulatory entanglement attendant to state funding is not excessive); *Hunt v. McNair*, 413 U.S. 734, 745-49 (1973) (same); *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971) (same).

[59] See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (rejecting interpretation of statute requiring the

Entanglement analysis has thus been masking what is really a proper inquiry by civil courts concerning regulatory intrusion (or lack thereof) into inherently religious matters. The focus on subject matters that are "inherently religious" makes sense because elsewhere this Court has said that government does not exceed the restraints of the Establishment Clause unless it is acting on (or intruding into) such matters.[60] The Court has found that prayer,[61] devotional Bible reading,[62] veneration of the Ten Commandments,[63] classes in confessional religion,[64] and the

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government to distinguish between secular and religious benefits as fraught with entanglement); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (uniform application of statute to all religious schools avoids entangling inquiry by IRS officials); see also *Bd. of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 252-53 (1990) (upholding Equal Access Act because, *inter alia*, attempting to exclude religious speech would create greater entanglement problems); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) (plurality opinion) (overturning religious exemption is a laudable rule of law because it reduces possible entanglement); *Widmar v. Vincent*, 454 U.S. 263, 270 n.6, 272 n.11 (1981) (preventing public university from excluding religious worship or religious speech from designated public fora is a laudable rule of law because it reduces possible entanglement); *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (employing, whenever possible, neutral-principles approach to resolve religious disputes avoids entanglement with religious doctrine, polity, or practice).

[60] *Bowen v. Kendrick*, 487 U.S. 589, 605, 612-13 (1988) (counseling teenagers to remain chaste is not an inherently religious activity, even when the counseling takes place at religious counseling centers).

[61] *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of Abington Tsp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[62] *School Dist. of Abington Tsp. v. Schempp*, 374 U.S. 203 (1963).

[63] *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

[64] *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

biblical story of creation taught as science[65] are all inherently religious. Hence, by virtue of the Establishment Clause, the Court held these topics were off limits as objects of any legislation, purposeful action by executive branch officials, or judicial inquiry.

The Chapter 2 program, in both purpose and effect, is about improving the welfare of society, specifically the improvement of educational opportunities for all elementary and secondary students without regard to where the students are enrolled. Because the government is not intruding into matters inherently religious by merely loaning educational equipment to K-12 schools (hence, the "entanglement" is not "excessive"), the Establishment Clause restraint has not been transgressed by Chapter 2 or its implementation by the State of Louisiana.

CONCLUSION

Amici request that this Court hold that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 7301-7373 (Supp. 1998), and its legislative counterpart in the State of Louisiana, as applied, do not violate the Establishment Clause.

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[65] *Edwards v. Aguillard*, 482 U.S. 578 (1987); see *Epperson v. Arkansas*, 393 U.S. 97 (1968).

APPENDIX

STATEMENTS OF INTEREST

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students, and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious belief and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980. These include *Widmar v. Vincent*, 454 U.S. 263 (1981); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993); *Rosenberger v. Rectors of Univ. of Virginia*, 515 U.S. 819 (1995); and *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997).

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence

(1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, 25 years of experience, and professional resources enable it to speak with authority upon religious liberty.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.